

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

United States Court of Appeals
Fifth Circuit

FILED

December 28, 2009

Charles R. Fulbruge III
Clerk

No. 08-60804
Summary Calendar

JOSHUA K BRINK,

Petitioner - Appellant

v.

LAWRENCE KELLY, Superintendent,

Respondent - Appellee

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 1:06-CV-525

Before REAVLEY, DAVIS, and HAYNES, Circuit Judges.

PER CURIAM:*

The judgment of the district court denying habeas relief is affirmed for the following reasons.

The certificate of appeal was granted to allow appeal of the failure of the state trial court to give a jury instruction relative to the defendant's reputation for peacefulness.

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

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One instruction that was refused read: “The Court instructs the jury that in case of doubt, Joshua Kevin Brink’s previous good reputation for peacefulness should turn the scale in his favor.”

Another refused instruction read: “The Court instructs the jury that Defendant in a criminal case may offer his good character to evidence the improbability of his doing the act charged.”

As has been explained by the Mississippi courts and the federal court, Mississippi law does not allow a trial judge to comment on testimony or weight of the evidence, and instructions on the reputation or character of the accused are objectionable. Both of the refused instructions were improper under Mississippi law.

Mississippi law and the ruling in this case is not contrary to federal law as determined by the Supreme Court. The writ could not be granted.

AFFIRMED.